

**STATUS REPORT FOR EQC**

**MAY 3, 2012**

**MONTANA RESERVED  
WATER RIGHTS  
COMPACT  
COMMISSION**

# Statutory Mandate

**The statutory mission of the Compact Commission is to conclude compacts for the equitable division and apportionment of waters between the state and its people and the several Indian tribes and the federal government claiming reserved water rights within the state. Section 85-2-701, MCA.**



# Compact Commission Members

Chris Tweeten, Chairman

Dorothy Bradley

Mark DeBruycker

Richard Kirn

Gene Etchart

Representative Dick Barrett

Representative Daniel Salomon

Senator Carol Williams

Senator Debby Barrett

# Federal Reserved Water Rights

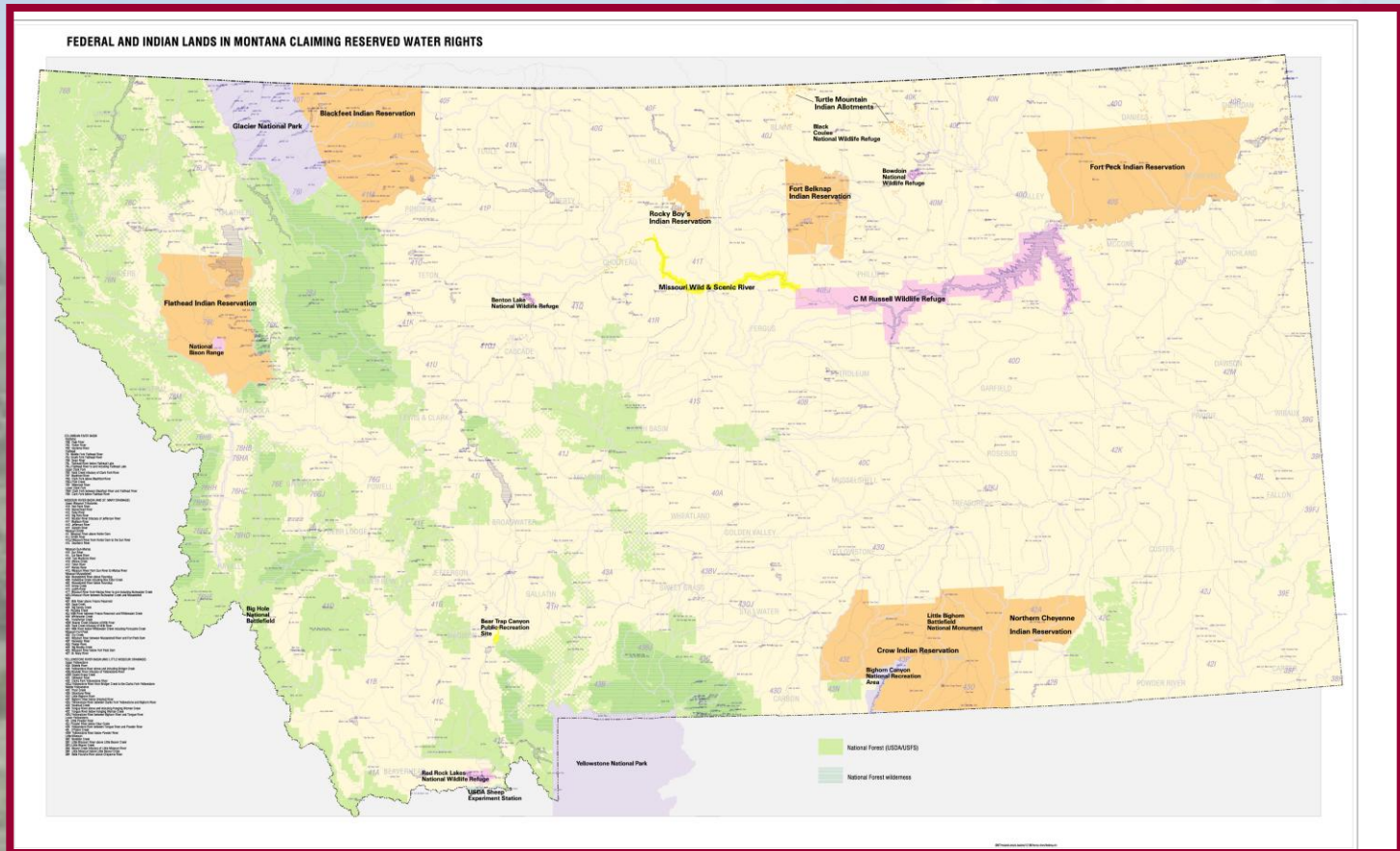
A federal reserved water right is created under federal law and is a right to use water implied from an act of congress, a treaty, or an executive order establishing a tribal or federal reservation.



# Reservation of Water

The 1908 Supreme Court held that when congress or the president sets aside land out of the public domain for a specific federal purpose, such as an Indian reservation, a quantity of water is reserved which is necessary to fulfill that specific federal purpose. *Winters v. United States*

# Federal and Tribal Lands Claiming Reserved Water Rights in Montana





# Water Compacts in Montana

- Fort Peck – Assiniboine and Sioux Tribes - 1985
- Northern Cheyenne – 1992
- U.S. National Park Service –1994
  - Glacier National Park
  - Yellowstone National Park
- U.S. National Park Service –1995
  - Little Bighorn Battlefield
  - Big Hole Battlefield
  - Bighorn Canyon NRA

# Water Compacts in Montana

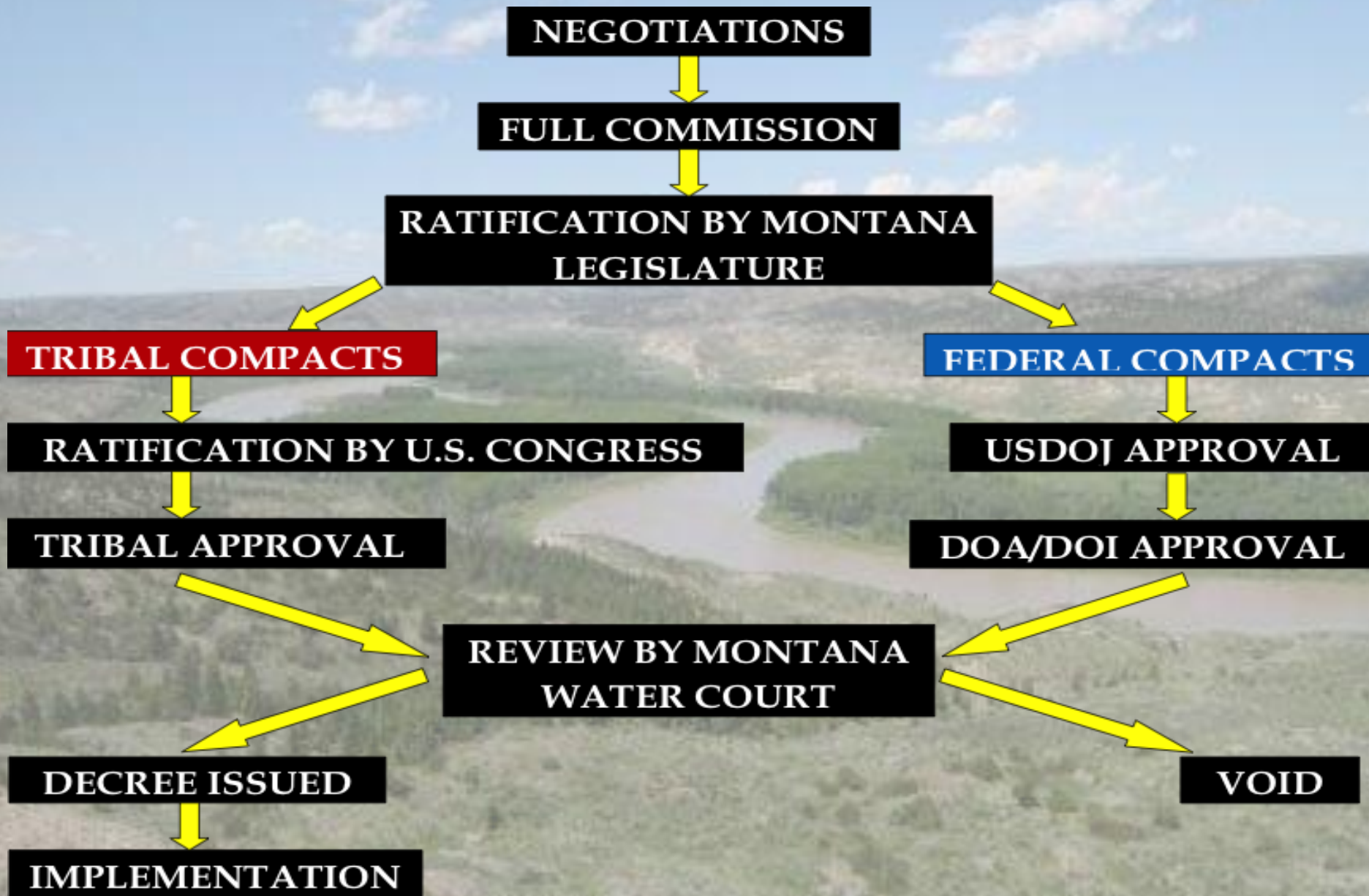
- U.S. Bureau of Land Management – 1997
  - Upper Missouri National Wild & Scenic River
  - Beartrap Canyon NRA
- Rocky Boy's Reservation – Chippewa Cree Tribe -1997
- U.S. Fish & Wildlife Service – 1997, 1999
  - Black Coulee, Benton Lake & Red Rock Lakes
- Crow Tribe – 1999
- Fort Belknap – Gros Ventre and Assiniboine Tribes – 2001



# Water Compacts in Montana

- USDA Agriculture Research Service – 2007
  - Fort Keogh & Sheep Experiment Station
- US Fish & Wildlife Service – 2007
  - Bowdoin National Wildlife Refuge
- USDA Forest Service – 2007
- Blackfeet Tribe – 2009
- US Fish & Wildlife Service – 2009
  - National Bison Range

# The Compact Process





# Sunset Date

- The Reserved Water Rights Compact Commission will sunset on July 1, 2013
- Commission Staff Transitions to DNRC-Water Resources Division to Continue Compact Implementation Work.

# Water Compacts Remaining To Be Negotiated

- U.S. Fish & Wildlife Service
  - Charles M. Russell National Wildlife Refuge
- Bureau of Land Management
  - Upper Missouri River Breaks National Monument
- Confederated Salish and Kootenai Tribes - Flathead Reservation
- Turtle Mountain Band of Chippewa



# ANTICIPATED 2013 LEGISLATION

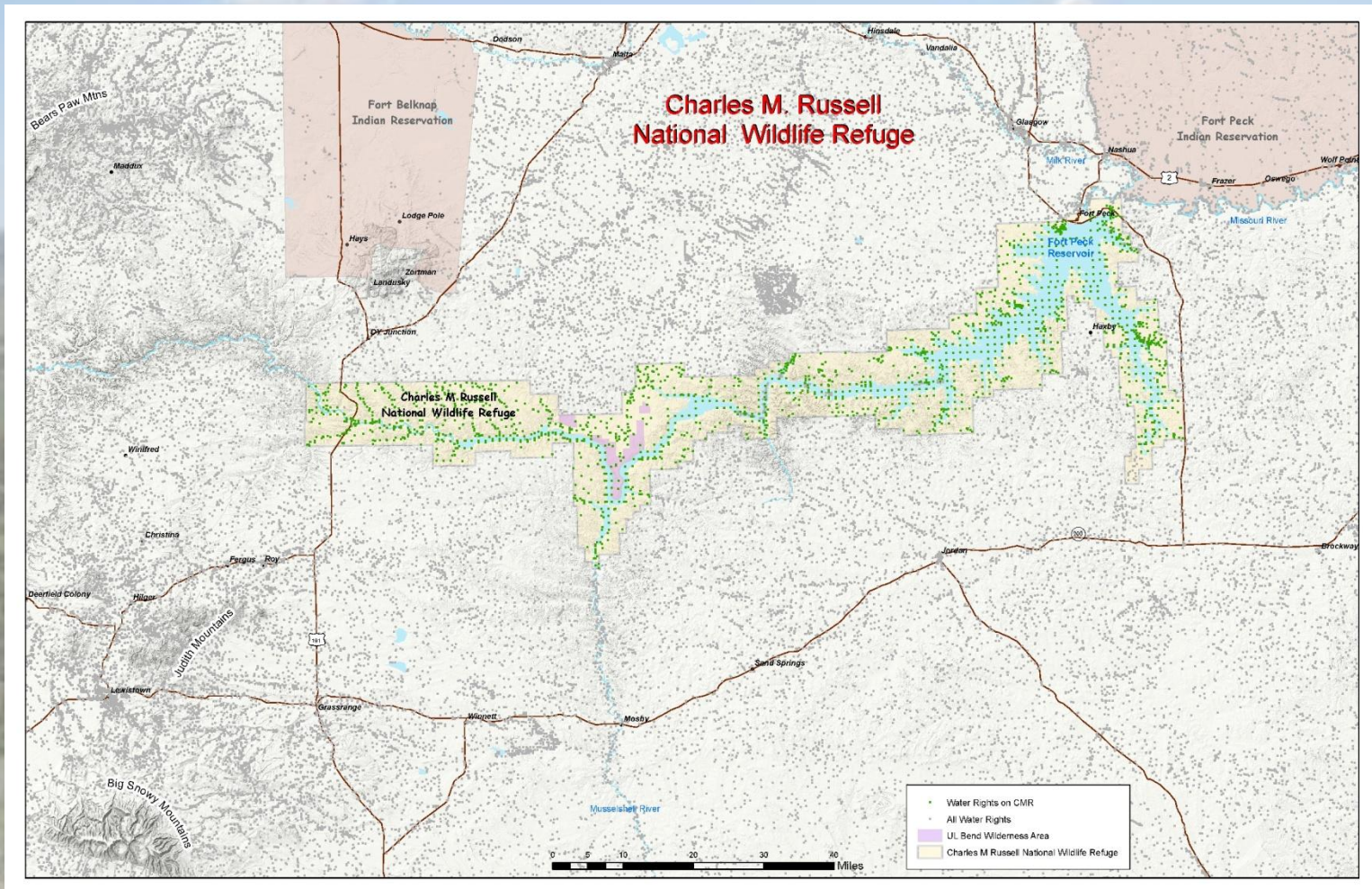
- Confederated Salish and Kootenai Tribes - Montana Compact
- USFWS Charles M. Russell National Wildlife Refuge Compact – Montana Compact
- BLM Upper Missouri River Breaks National Monument Compact – Montana Compact
- Fort Belknap-Montana Compact Funding
- Sunset Reserved Water Rights Compact Commission

# PUBLIC INPUT

- ALL NEGOTIATION SESSIONS ARE OPEN TO THE PUBLIC & WIDELY NOTICED
- INTENT TO HAVE DRAFT COMPACTS AVAILABLE FOR PUBLIC REVIEW LATE SUMMER 2012
- MULTIPLE PUBLIC MEETINGS WITHIN THE AFFECTED AREA OF ALL THREE COMPACTS



# Charles M. Russell Refuge





# Charles M. Russell National Wildlife Refuge - USFWS

- Created by Executive Order 7509 in 1936.
- USFWS Compact Proposal – January 17, 2012
- Focus of proposal is on the protection and rehabilitation of riparian habitat.
- USFWS seeks rights to all water in 157 sub-basins after:
  - Protection of existing state-based uses as of effective date of Compact
  - Stock ponds and groundwater developments that meet permit exceptions.
- Priority date of December 11, 1936
- USFWS seeks closure to new appropriations with exceptions.



# Charles M. Russell National Wildlife Refuge - USFWS

- 1<sup>st</sup> Negotiation Session March 15, 2012
- Issues
  - Geographic scope of proposal
  - Lack of clarity on applicability to Fort Peck Reservoir
  - Rationale for purpose of reserved right
  - Post-Compact closure to new appropriations, including groundwater.
  - Development and maintenance of stock ponds on private and BLM lands.

# Charles M. Russell National Wildlife Refuge - USFWS

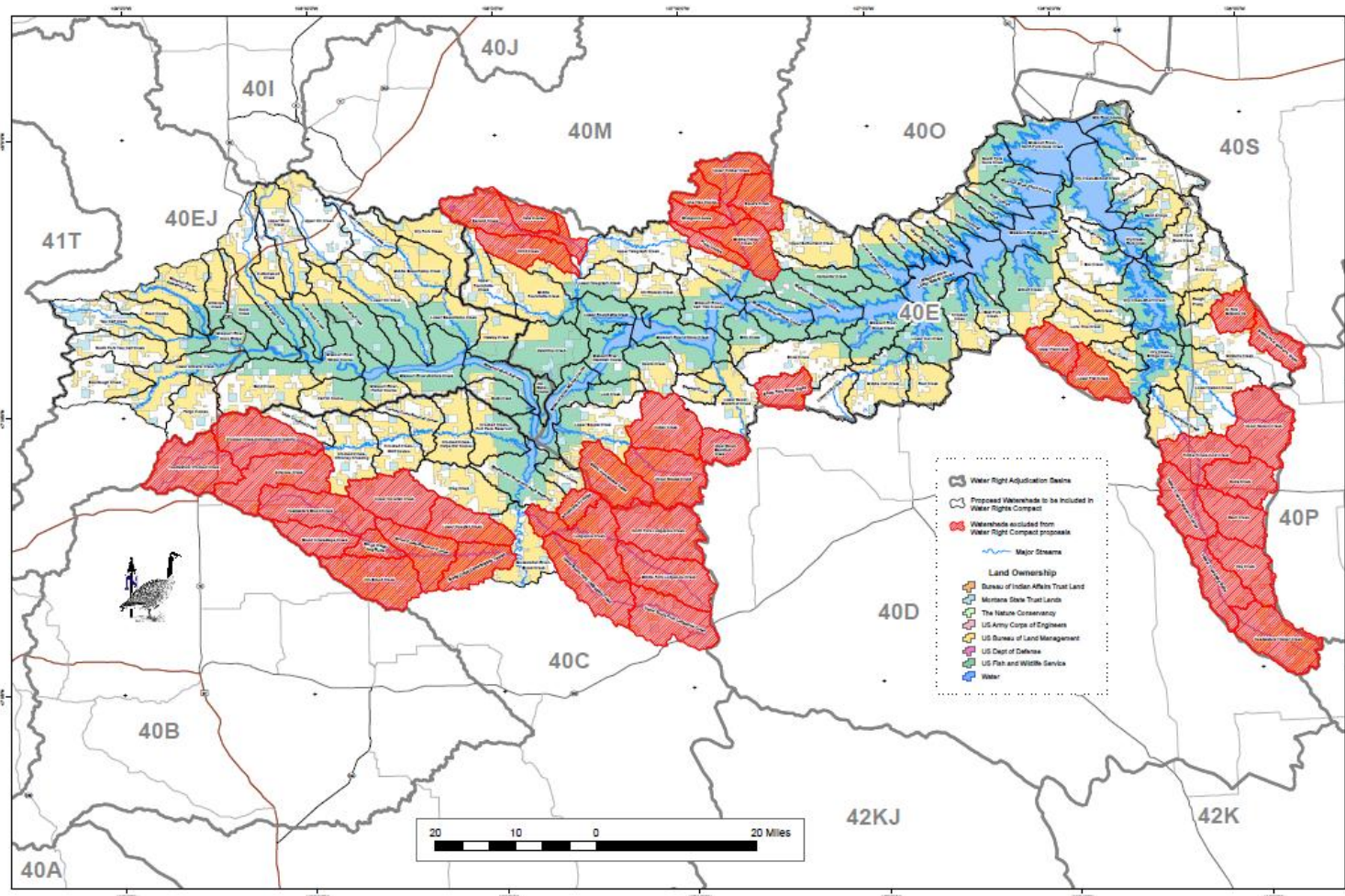
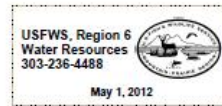
- Modifications to USFWS's 1/17/12 Proposal
  - Anticipated prior to next Negotiation Session
- **Next Negotiation Session:**
  - **May 9, 2012 @ 1:00 pm Lewistown Yogo Inn**



# Revised Proposal Map - USFWS



## Land Ownership and Proposed Sub-Watersheds for Federal Reserved Water Rights Compact with the State of Montana Near Charles M. Russell National Wildlife Refuge



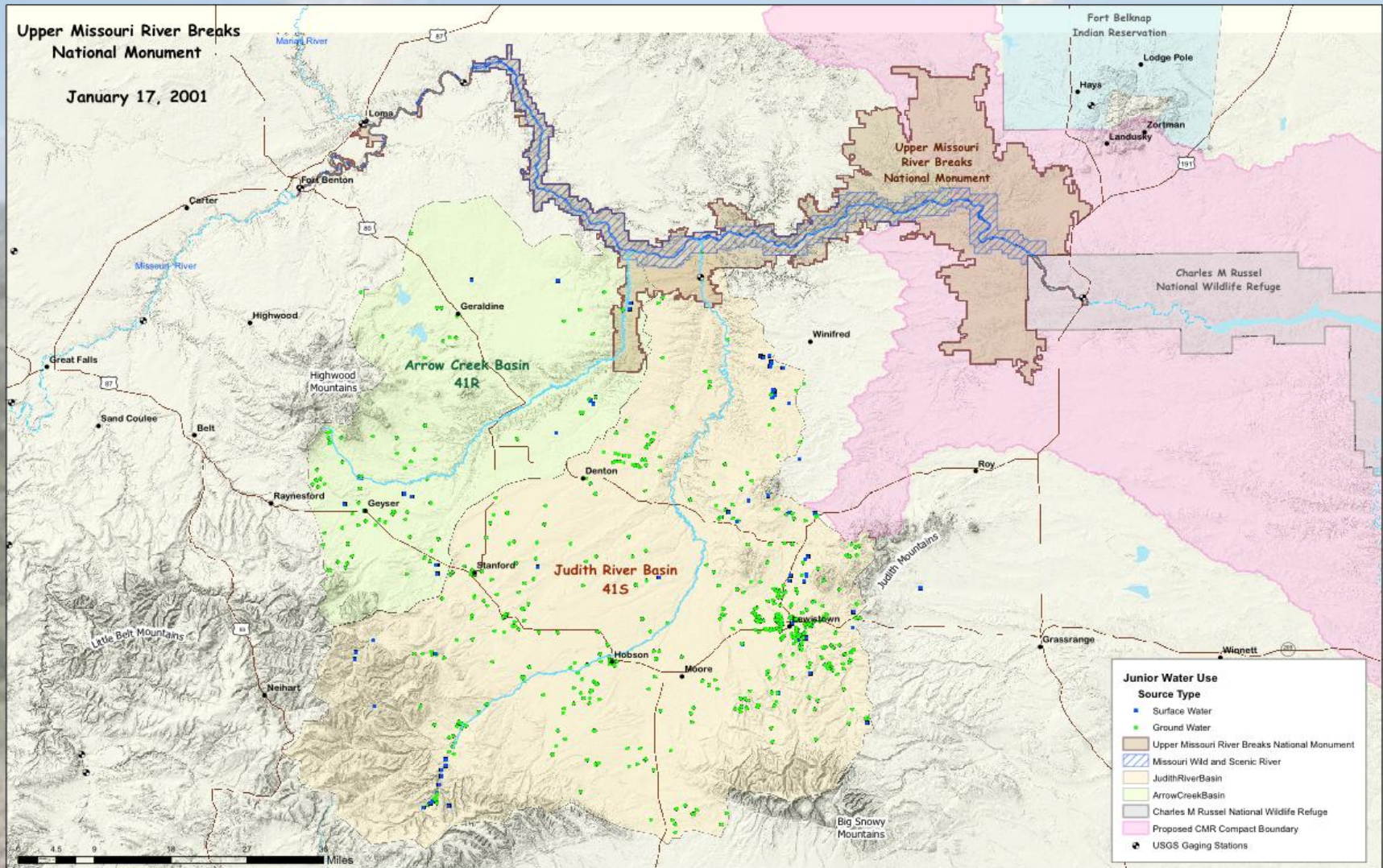
# Charles M. Russell National Wildlife Refuge - USFWS

- Modifications to USFWS's 1/17/12 Proposal

- Next Negotiation Session:
  - May 9, 2012 @ 1:00 pm Lewistown Yogo Inn



# Upper Missouri River Breaks National Monument





# Upper Missouri River Breaks National Monument

- Compact proposal limited to Judith River & Arrow Creek
- Purpose: Protect water dependent objects of biological interest, such as cottonwood forests
- Junior priority date (June 17, 2001).
- Negotiations sessions January 31, March 8 & May 1, 2012
- Revised proposal received April 27, 2012
- Cap on future development rescinded



# Upper Missouri River Breaks National Monument - BLM

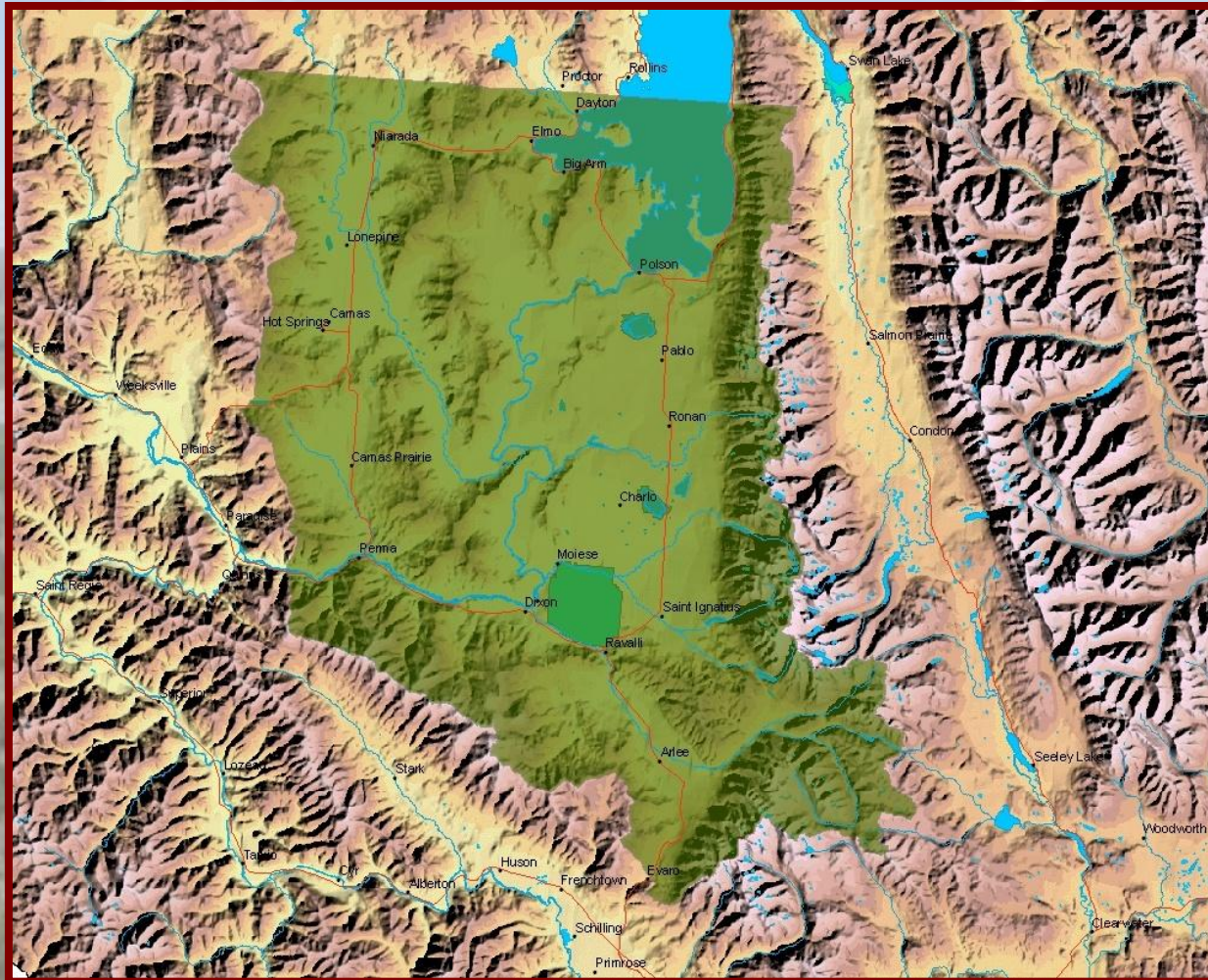
- Provisions of BLMs' Revised Proposal:
  - Base flow of 160 cfs for Judith River
    - 2001 priority date
    - Administered concurrently with DFWP Judith River Water Reservation (160 cfs & 1985 priority date)
  - Base flow 3.5 cfs for Arrow Creek (3/1 - 7/31)
    - 2001 priority date
    - Measured upstream at Highway 80 bridge

# Upper Missouri River Breaks National Monument - BLM

- Provisions of BLMs' Revised Proposal:
  - Diversion rate modifications for new permits limited to 20 cfs per day
  - No new mainstem storage on Judith River
    - Downstream from Middle / South Fork confluence
  - No new mainstem storage on Arrow Creek
    - Downstream from Hay Creek confluence



# Flathead Indian Reservation





# CSKT COMPACT

- ▣ Protection of Existing Verified Uses
- ▣ Unitary Management Ordinance
- ▣ On-Reservation Tribal Water Rights
- ▣ Flathead System Compact Water
- ▣ Off-Reservation Water Rights Proposal
- ▣ State Contribution To Settlement



# CSKT COMPACT

- ▣ **Protection of Existing Verified Uses**
  - Call Protection for Non-Irrigation Uses
  - Incorporates Pending Permits & Changes
  - Incorporates Pending 602's - Domestic Wells
  - Stipulation Agreement-CSKT & FBC

# CSKT COMPACT

- ▣ **Unitary Management Ordinance**
  - Water Right Administration for the Reservation
  - Solution to Current Regulatory Void
  - Parallels Montana Water Use Act
  - Unitary Management Board
  - Registration of Existing Uses
  - Domestic Allowance
  - Stockwater Allowance
  - Permit & Change Process
  - Enforcement



# CSKT COMPACT

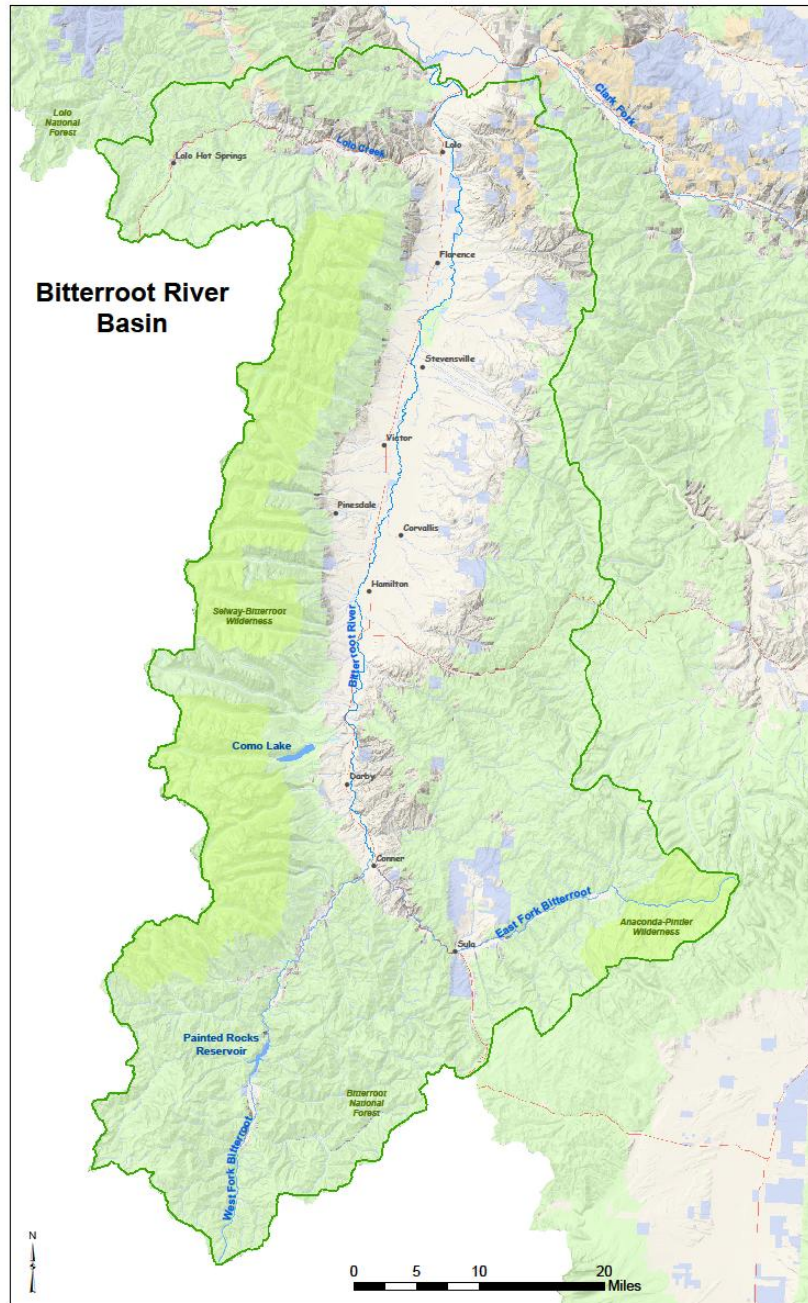
## ▣ On-Reservation Tribal Water Right

- Instream Flow for Fish & Wildlife
- High Mountain Lakes
- Wetlands
- Flathead Indian Irrigation Project
- Existing & Historic Use by Tribe & Allottees
- Future Domestic, Commercial, Municipal & Industrial
- Flathead System Compact Water
  - ▣ Allocation of 229,383 Ac. Ft. per Year from Flathead
  - ▣ Up to 90,000 Acre Feet per Year From Hungry Horse
  - ▣ Up to 128,158 Acre Feet per Year Consumed
  - ▣ State Request for 11,000 Acre Feet per Year for Mitigation

# CSKT COMPACT

- ▣ **Off-Reservation Water Rights Proposal**
  - **Stevens Treaty- right to “take fish” in “usual and accustomed locations”**
  - **Case Law - Right to use of water outside Reservation to maintain fisheries flow**
  - **Protections in Five Western Montana Drainages**
    - ▣ **Bitterroot**
    - ▣ **Swan**
    - ▣ **Kootenai**
    - ▣ **Flathead (Above Kerr Dam)**
    - ▣ **Upper Clark Fork**





# **CSKT Off-Reservation Proposal**

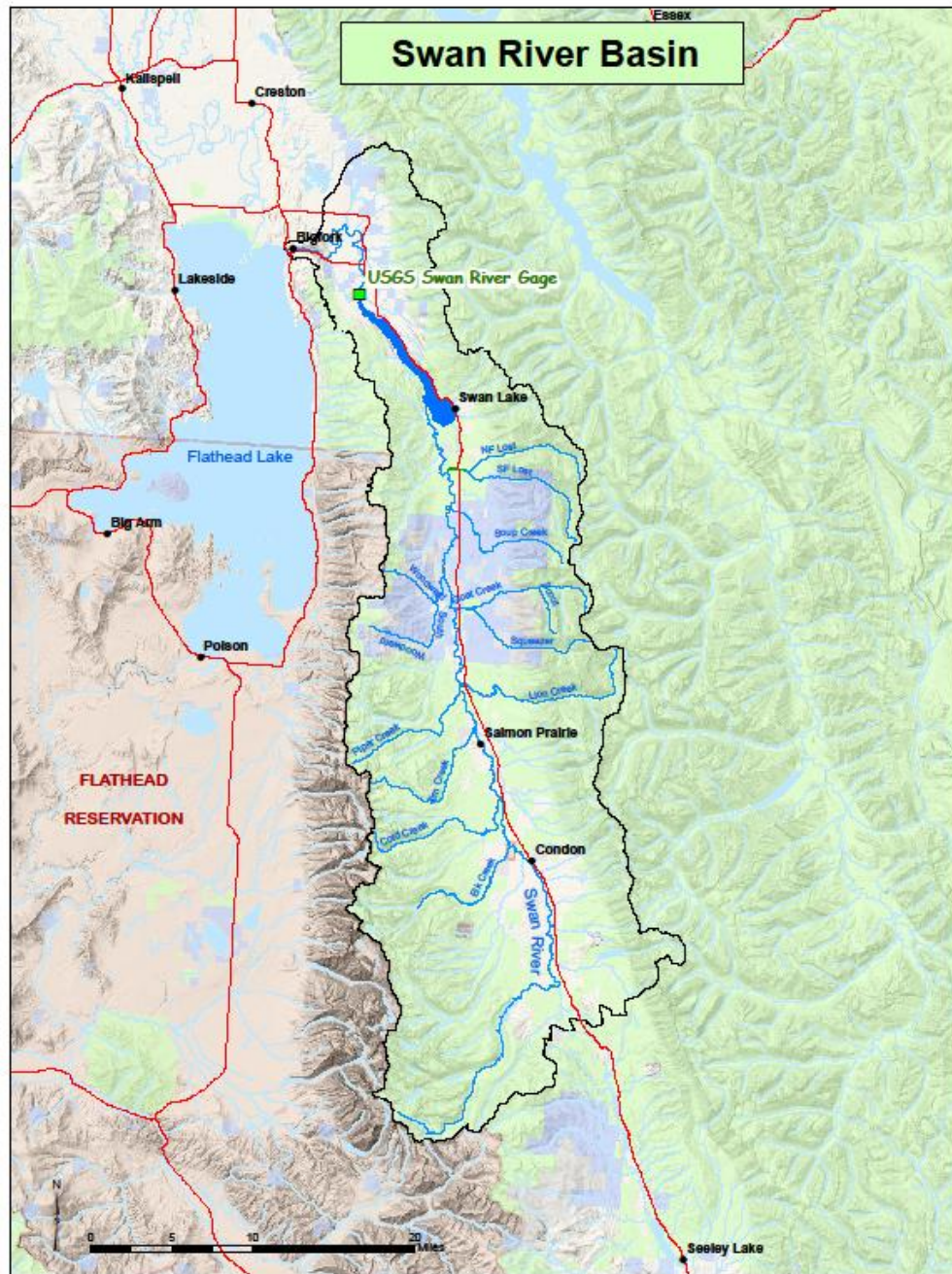
## **▣ Bitterroot River Basin**

- **Co-ownership between CSKT & MFWP of MFWP's contract rights from Painted Rocks and Como Reservoirs**
- **Co-ownership between CSKT & MFWP of MFWP's instream and recreation claims on Bitterroot River.**



# CSKT Off-Reservation Proposal

- ▣ **Common Attributes – Swan, Kootenai, Upper Clark Fork**
  - **Non-Consumptive Use**
  - **Purpose: Maintenance & Enhancement of Fish Habitat**
  - **Not Changeable to Other Purposes**
  - **Call Protection For All Uses Except:**
    - ▣ **Junior surface water irrigators**
    - ▣ **Junior groundwater irrigators with flow > 100 gpm**
    - ▣ **Rights developed after effective date of Compact**
  - **In-Channel Use Only- No Diversion**
  - **Year-Round Period of Use**
  - **Require Real-Time Flow Data to be Enforced**



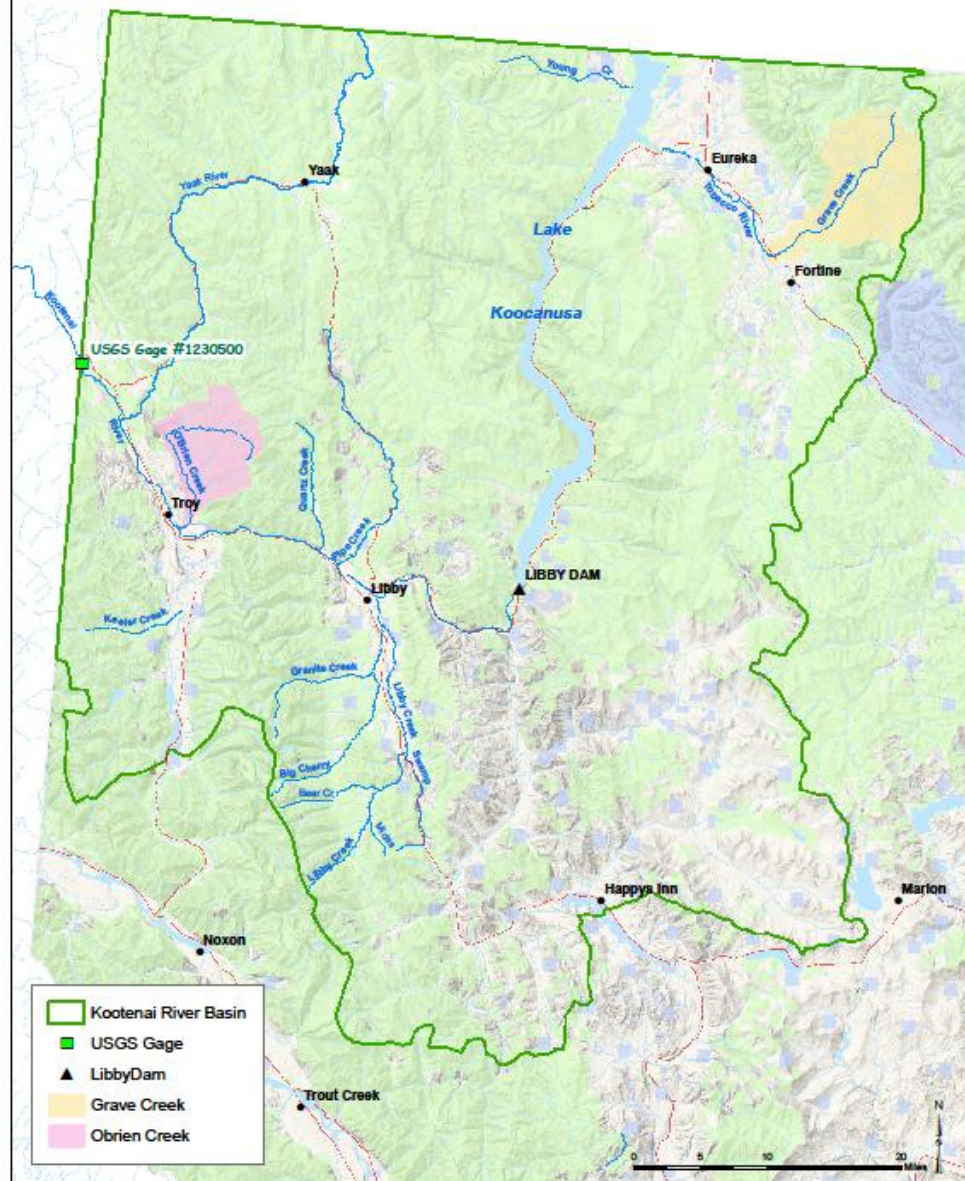


# **CSKT Off-Reservation Proposal**

## **▣ Swan River Basin**

- **Mainstem Instream Flow Right**
  - ▣ **Time immemorial priority date**
  - ▣ **Enforceable only against surface water irrigation and groundwater irrigation > 100 gpm**
  - ▣ **Call based on USGS gage on Swan River at Bigfork**
- **Post-Compact appropriation limit on 15 stream reaches on 12 tributary streams.**
- **No Limitations on Uses Exempted From Permitting**

## Kootenai River Basin





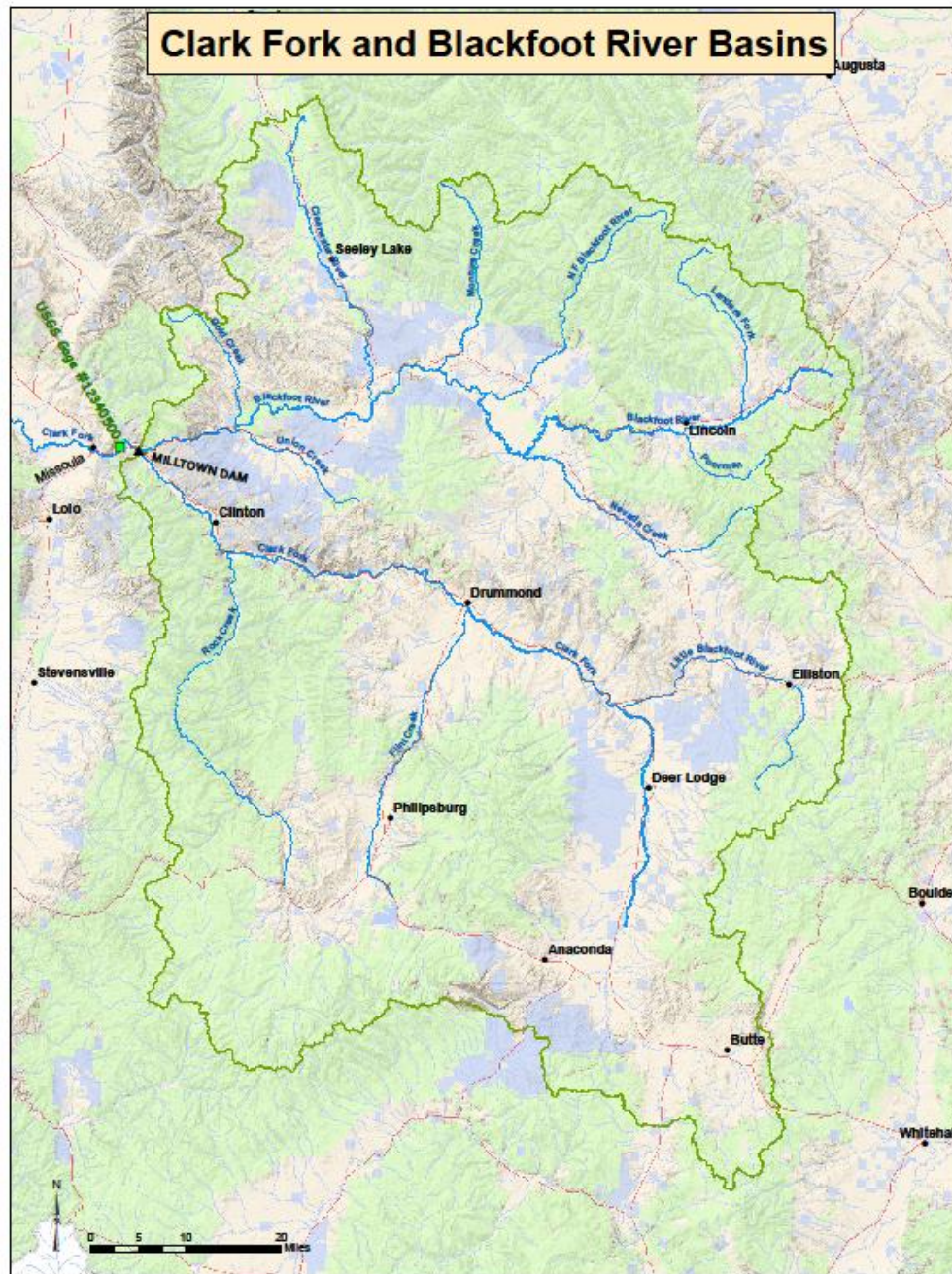
# **CSKT Off-Reservation Proposal**

## **▣ Kootenai River Basin**

- **Mainstem Instream Flow Right**
  - ▣ **Time immemorial priority date**
  - ▣ **Enforceable only against surface water irrigation and groundwater irrigation > 100 gpm**
  - ▣ **Call based on USGS gage on Kootenai River at Leonia, ID**
- **Ability to make call suspended as long as Libby Dam is in place and operated in accord with Biological Opinion & Montana Operation**
- **Post-Compact appropriation limits on 14 stream reaches on 11 tributary streams.**
- **No Limitations on Uses Exempted From Permitting**
- **Co-ownership of DFWP rights on Tobacco River & Young Creek**



# Clark Fork and Blackfoot River Basins





# CSKT Off-Reservation Proposal

- ▣ Upper Clark Fork River Basin
- ▣ Co-ownership of Murphy Rights on Blackfoot River and Rock Creek
- ▣ Co-ownership of 10 Recreation claims
- ▣ Milltown Dam water right – Co-ownership
  - Acquired by Montana as part of settlement of the Natural Resources Damages litigation against ARCO & Northwestern Energy
  - 2000 cfs right with a December 11, 1904 priority date

# CSKT Off-Reservation Proposal

- ▣ Milltown Dam Water Right
- ▣ Right retains 1904 priority date
- ▣ Right to be co-owned by MFWP and CSKT
  - Details of co-ownership being developed
- ▣ Purpose to be changed to instream flow (from power generation)
- ▣ Still a non-consumptive right
- ▣ 2000 cfs flow rate



# CSKT Off-Reservation Proposal

## ▣ Milltown Dam Water Right

- Quantification point at USGS gauge immediately below the former Milltown dam site
- Right retains 2000 cfs flow rate but is callable only when average daily flow drops below *enforceable level*
- Enforceable value tracks a flow level based on historic flows in drier years, bounded by a ceiling of 2000 cfs (the full measure of the right) and a floor of 1,100 cfs (below which the impacts to the fishery become problematic)

# CSKT Off-Reservation Proposal

- ▣ Milltown Dam Water Right

Right enforceable *only* against junior surface water irrigators and groundwater irrigators with a flow rate above 100 gpm

- ▣ Co-ownership of FWP filed instream flows claims on the Blackfoot River and Rock Creek
- ▣ Co-ownership of FWP filed public recreation claims on lakes in the Blackfoot River drainage (mainly the Clearwater)



# State Contribution To Settlement

Crow Tribe Compact (1999) - \$15 million

Fort Belknap Compact (2001) - \$17 million

Blackfeet Tribe Compact (2009) - \$35 million

Confederated Salish & Kootenai Tribes Compact

# INFORMATION

- RWRCC Website
  - [www.dnrc.mt.gov/rwrcc/](http://www.dnrc.mt.gov/rwrcc/)
- Compact Page
  - <http://www.dnrc.mt.gov/rwrcc/Compacts/Default>
- RWRCC Staff – Helena DNRC Headquarters
  - Staff Directory @ 406-444-6841
    - Bill Schultz, Program Manager (Missoula)  
406-542-5880  
[bischultz@mt.gov](mailto:bischultz@mt.gov)